

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA)
)
)
VS.) CRIMINAL ACTION NO.
)
) B-18-CR-8
)
RODNEY MESQUIAS, HENRY)
MCINNIS AND FRANCISCO PENA)
)

TRIAL - DAY TEN
BEFORE THE HONORABLE ROLANDO OLVERA
NOVEMBER 4, 2019

A P P E A R A N C E S

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1 THE COURT: Thank you, everyone. Please be
2 seated.

3 Good morning.

4 Gentlemen, announcements?

5 MR. TONY CANALES: May I address the Court,
6 Your Honor?

7 THE COURT: Yes, Mr. Canales.

8 MR. TONY CANALES: Tony Canales on behalf of
9 Mr. Mesquias.

10 In the absence of the jury, we'd like to
11 inform the Court that Defendant Mesquias will --

12 COURT REPORTER: Mr. --

13 THE COURT: And -- and --

14 MR. TONY CANALES: I'll come on up.

15 In the absence of the jury, I'm going to
16 inform the Court that we're going to present -- we're
17 going to rest.

18 THE COURT: All right.

19 MR. TONY CANALES: And I have -- I think --
20 Mr. Cyganiewicz.

21 MR. CYGANIEWICZ: We have the same
22 announcement, Your Honor. We don't plan -- this was
23 discussed with my client in detail on numerous times,
24 including yesterday, and we're not going to call any
25 witnesses. Mr. McInnis has elected not to testify and

1 we're going to rest also.

2 THE COURT: Mr. Guerra?

3 MR. GUERRA: Yes, Your Honor, that's
4 correct. On behalf of Dr. Francisco Pena, we do not
5 intend to call any witnesses. Dr. Pena will not be
6 testifying. We've discussed this with our client, and
7 as such, we will rest as well.

8 THE COURT: Thank you, gentlemen.

9 MR. TONY CANALES: May I continue,
10 Your Honor?

11 THE COURT: Yes, Mr. Canales.

12 MR. TONY CANALES: I spoke to opposing
13 counsel before the Court came in as to talk about some
14 kind of a scheduling.

15 We have a joint recommendation to the -- for
16 the Court regarding scheduling. We recommend to the
17 Court, with the Court's approval, that the Court, after
18 we rest in front of the jury, that the Court send the
19 jury home, that the jury come back in the morning, and
20 that today we'll have a charge conference. It's -- it
21 will be a long charge, a lot of typing to do, a lot of
22 sheets.

23 I have -- for example, I have analyzed and
24 have given a copy to opposing counsel, all the proposed
25 Fifth Circuit pattern jury charges that the Government

1 has proposed, I'll be more than glad to share it with
2 the Court's clerk, and be able to show that there's some
3 that they did not include that we would like to be
4 included. And on top of that -- but, that's pattern
5 jury charge stuff, that's -- that one is easy.

6 And of course, I have about 13, 14 special
7 instructions, jury instructions for the jury,
8 Your Honor, that I think needs to have some -- some
9 in-depth argument to the Court. They're not your
10 standard type of -- type of instructions.

11 So because of that, and not to be hurried
12 for jury argument, I submit to the Court, if the Court
13 agrees with that, send the jury home and we come back
14 tomorrow morning. They'll be fresh; we can argue all
15 day. I don't know how much time you're going to give us
16 to argue, but as you well know lawyers want to have all
17 the time in the world for that. And so that's something
18 for the Court also to consider. We have not discussed
19 that part of the case yet, but anyway -- I just wanted
20 to inform the development we had today, Your Honor.

21 THE COURT: All right. Thank you,
22 Mr. Canales.

23 Mr. Lowell, your response?

24 MR. LOWELL: No opposition to taking the
25 rest of the day to confer on the jury charge and come up

1 with a set of jury instructions to submit for the
2 Court's consideration.

3 THE COURT: All right. Gentlemen, just
4 obviously, just shooting from the hip very quickly, the
5 Court concurs that the Court wants to give each party
6 significant and adequate time to prepare the charge.
7 Obviously, I imagine it's going to be a complex
8 document. The only possible option I might consider
9 is -- well, if we could somehow get it -- well, let's
10 let the jury go home and we'll -- we'll -- we'll -- our
11 goal is to get it done as quickly as possible, but I
12 contemplated maybe reading it to them late and allowing
13 arguments first thing, but that's fine.

14 We'll let them go home and we'll get --
15 we'll start everything tomorrow morning.

16 MR. TONY CANALES: Thank you, Your Honor.
17 Can I hand over to your clerk what I -- what I think is
18 the -- the list of pattern jury charges that they have
19 submitted and the ones -- the ones that I think are
20 missing, or we'll do that during the charge conference?

21 THE COURT: Well, at this -- let's go ahead
22 and go off the record.

23 COURT REPORTER: Yes, sir.

24 (Discussion off the record.)

25 MR. CYGANIEWICZ: Judge, just a simple

1 request. I know you instructed the jury, you know, and
2 when they were empaneled, when we left on Friday the
3 last thing the Court said to the jury was that the
4 Defendants will begin their case on Monday.

5 I'm asking, on behalf of everyone to, again,
6 caution the jury and instruct the jury just for a few
7 seconds about, again, Defendant does not have to prove
8 anything and that they're presumed innocent. Just to
9 remind them that they were left with an impression that
10 we will be --

11 THE COURT: I think I -- I said in the
12 original instructions that during the course of the
13 trial, the Government goes first and then the Defense,
14 but, yes, we'll clarify that.

15 MR. CYGANIEWICZ: Thank you, Judge.

16 THE COURT: Anything else?

17 MR. CYGANIEWICZ: Want to discuss the time
18 for argument now or later, Your Honor?

19 THE COURT: How much time do you all want
20 foreclosing?

21 MR. LOWELL: Your Honor, the Government
22 requests respectfully an hour and 45 minutes for both
23 closing and rebuttal.

24 THE COURT: And gentlemen, how much time
25 does each side want for closing?

1 MR. HECTOR CANALES: I didn't hear, what did
2 the Government --

3 MR. CYGANIEWICZ: One forty-five.

4 THE COURT: One forty-five.

5 MR. HECTOR CANALES: Well, I'd like the same
6 that they ask for, Judge.

7 MR. CYGANIEWICZ: I don't know if I'd use
8 that, but I would --

9 MR. HECTOR CANALES: I don't either, but I'd
10 like the opportunity to have equal time.

11 THE COURT: And --

12 MR. CYGANIEWICZ: Or an hour and a half?

13 THE COURT: I mean, gentleman, you -- you
14 each opened in less than 30 minutes, do you think you're
15 going to triple the amount for closing?

16 MR. LOWELL: It's possible.

17 THE COURT: All right. I would think that
18 an hour would be sufficient, that would be double
19 your -- your openings, but I mean, let's discuss this.
20 I mean, do you really want a full hour -- I'm not going
21 to give you an hour and 45, I'll consider an hour and a
22 half. That's triple your openings, but I would think
23 double is adequate but --

24 MR. HECTOR CANALES: We can do it in an hour
25 and a half, Judge, we can.

1 THE COURT: All right. Let's give everybody
2 an hour and a half.

3 You want -- how do you want to split it up,
4 an hour first or --

5 MR. LOWELL: An hour for closing, rebuttal
6 30 minutes.

7 THE COURT: All right. And you each want?

8 MR. HECTOR CANALES: An hour and a half.

9 THE COURT: I mean, obviously each side is
10 going to get the same amount, not that -- I don't expect
11 everybody to use it, but that's fine. All right.

12 MR. LOWELL: Your Honor, the only issue is
13 just in estimating this time, we have the jury
14 instructions to go through with the jury, we have the
15 elements of each of the offenses and that obviously adds
16 to the time, so we're just trying to make sure that we
17 have an adequate cushion to get through all of that.

18 MR. HECTOR CANALES: Starting at 9:00, we
19 will.

20 THE COURT: Well, an hour and a half for
21 everybody, that's conceivably six hours, that's a whole
22 day, but all right, conceivably. All right. Let's --
23 let's bring the jury on in. We'll give everybody an
24 hour and a half. Be careful what you wish for, you may
25 get it.

1 MR. LOWELL: Your Honor -- Your Honor, may I
2 raise a couple other issues?

3 THE COURT: Sure.

4 MR. LOWELL: So I just want to confirm for
5 the record that counsel for Mesquias had discussions
6 with Defendant Mesquias and that Mr. Mesquias has
7 elected not to testify.

8 MR. TONY CANALES: Yes, Your Honor, we did
9 have discussions with Mr. Mesquias. We were informed
10 the Government, he has elected not to testify, Your
11 Honor.

12 We were -- we were informed that the
13 Government has visited some of our witnesses, and as a
14 result of visiting some of our witnesses, a couple of
15 them have informed us that if we were -- if we were to
16 call them, they would plead the fifth, therefore, I
17 cannot call them knowing in advance that they're going
18 to plead the fifth; and, therefore, that has really
19 changed our -- our strategy and Mr. Mesquias knows about
20 it, and we have elected -- he has elected not to
21 testify, Your Honor.

22 THE COURT: Anything else?

23 MR. LOWELL: Your Honor, one other issue.
24 We had filed Motions in Limine, and I just wanted to
25 raise just two issues for the Court.

1 We would ask the Court to preclude the
2 Defense from making any arguments, comments or
3 references to, number one, whether or not this was a
4 selective or vindictive prosecution.

5 In reviewing the transcript for the opening,
6 we saw that counsel for the Defendants had made
7 references to this being a selective prosecution. We
8 would ask this Court to preclude the Defense from doing
9 that in their closing argument.

10 And the concern, Your Honor, is that the
11 jury here is to -- here to decide the guilt or innocence
12 of the three Defendants sitting in this courtroom and
13 that's confusing, causes prejudice, if the jury is
14 trying to consider whether or not other Defendants
15 should also be held guilty -- should also be held
16 accountable, or whether or not they should have
17 been charged. Has nothing to do, no bearing on the
18 specific objective that they're here to decide, which is
19 the guilt or innocence of these three Defendants.

20 That's the first issue.

21 MR. GUERRA: Your Honor, I believe this --
22 this issue has already been argued and decided upon by
23 the Court.

24 Earlier last week when we had this sort of
25 testimony, counsel for the Government raised these

1 issues already. The evidence is already in, they --
2 they -- they objected, the Court said, well, I'm going
3 to allow it, this is a viable defense. I don't
4 understand why - why this is an issue again.

5 But to the extent that it is, we would argue
6 that it is a viable defense. You have evidence elicited
7 from both sides, not just by the defense, by both sides
8 talking about actions taken by other doctors, Gonzaba,
9 Pelly, Posada, we heard the list, who are doing the
10 exact same thing.

11 The jury's already this evidence. We
12 believe it is a viable argument, and we believe it is
13 one that all -- all of the Defendants are entitled to
14 make in front of the jury.

15 We can't unring that bell.

16 MR. CYGANIEWICZ: Judge, more specifically
17 Ms. McMillan, the first witness who was the Medicare
18 expert, the Government's own witness, testified that
19 they could have been kicked out of the program, there
20 was no guidance on what makes it criminal, she discussed
21 administrator and civil options.

22 The point is that that testimony is -- is
23 before the jury. I'm not going to argue personally that
24 it's vindictive or selective, but we can comment on the
25 testimony of Ms. McMillan on the options she outlined.

1 I don't believe there's anything inappropriate,
2 especially since that testimony is already in front of
3 the jury.

4 MR. LOWELL: May I respond, Your Honor?

5 THE COURT: Yes.

6 MR. LOWELL: On the selective, vindictive
7 prosecution point. We had asked the Court if we could
8 submit -- if this objection was raised earlier, we asked
9 the Court if we could submit a brief on this point and
10 we did so over the weekend.

11 And the law is this: Any claim of selective
12 prosecution is a pretrial legal question for the Court
13 to decide under the specific procedures under Rule
14 12(b)3, it's not a factual question regarding the
15 Defendant's guilt for the jury. The deadline for making
16 such a motion is long past.

17 THE COURT: Gentlemen, let's -- I'll do
18 this. Let me review the brief. I'm assuming the
19 Defense didn't have a chance to -- if it was just
20 filed with a response.

21 MR. GUERRA: At 2:00 or 3:00 yesterday
22 afternoon, Your Honor.

23 THE COURT: All right. Let me review
24 everything; I'll take -- I'll take the issue under
25 advisement.

1 Is there any -- are there any miscellaneous
2 matters I need to take under advisement, or late filings
3 I need to review?

4 MR. LOWELL: No, Your Honor.

5 THE COURT: All right. Let me review the
6 filings, let me review the brief, I'll consider the --
7 gentlemen, again, the Court's already -- I believe the
8 Court -- Mr. Guerra's correct in term of the word
9 selective.

10 Now, I -- the Court is distinguishing -- the
11 Court will not allow a comment about a vindictive
12 prosecution, so that's -- that's -- that's -- that's --
13 that would -- but, let me consider the selective
14 argument, let me read the brief and we'll go forward
15 from there.

16 MR. GUERRA: And I don't think we've ever
17 used the word vindictive, and we don't --

18 THE COURT: It's just a phrase that's being
19 used in conjunction, so let's cut out the vindictive
20 part.

21 MR. GUERRA: Right.

22 THE COURT: That's easy. Let me review the
23 selective issue.

24 Anything else?

25 MR. GUERRA: No, Your Honor.

1 THE COURT: Let's bring the jury, let's send
2 them home and then you can speak to me even more.

3 All right. Let's bring them in.

4 COURT OFFICER: All rise for the jury.

5 (JURY IN.)

6 THE COURT: Ladies and gentlemen of the
7 jury, again, please be seated. Everyone be seated.

8 Welcome back. I hope everyone had a nice
9 weekend and we're ready to proceed.

10 Ladies and gentlemen of the jury, at this
11 time, I do have an update for all of you. And the
12 Defense has elected to rest. I remind you that -- of my
13 previous instructions to you. Perhaps, in explaining
14 the general course of a trial, I stated on Friday, or in
15 the opening instructions, that a normal course proceeds
16 in stages. The Government goes first and the Defense
17 goes second.

18 The Defense though, I remind you, also had
19 the Constitutional right, as I also instructed you that
20 not to testify, and I instructed you to that every
21 Defendant is presumed innocent until proven guilty, and
22 because of those standards, the burden of proof never
23 shifts to the Defense, and they have the Constitutional
24 right not to testify if they so elect and you cannot
25 hold that against them.

1 So we are now -- have received an update
2 that the Defense has elected not to testify and has
3 rested.

4 And with that being said, the next stage is
5 for the parties, each party has, again, the -- the right
6 to submit a prospective charge. The Court will review
7 the charge and prepare its own charge.

8 The charge is a template, the guide, the
9 Bible, the instructions, the manual, whatever synonym
10 you want to use, that will guide you through your
11 deliberations.

12 Now, as you're well aware, this has been a
13 lengthy trial. There's numerous exhibits, there's
14 numerous issues, the charge is going to take some time
15 to organize and draft and produce.

16 So what we're going to do is give you the
17 rest of the day off, the parties and the Court will
18 prepare the charge, we will read the charge to you
19 tomorrow morning, each side will then present their
20 closing arguments and then you will begin your
21 deliberations.

22 But rather than you just be waiting around
23 while we're working on this very lengthy document, I'm
24 going to go ahead and send you home.

25 So with that being said --

1 MR. HECTOR CANALES: Your Honor, excuse me.

2 THE COURT: Yes.

3 MR. TONY CANALES: On the record, we'd like
4 the opportunity to say that the Defense rests on the
5 record.

6 THE COURT: Excuse me.

7 MR. TONY CANALES: And I'm more than sure
8 the Government closes.

9 THE COURT: That -- let me -- that is
10 right. They're going to do their formal closing first,
11 but I wanted to give you this update and these
12 instructions.

13 So with that being said, the Court has given
14 you this update, gentlemen, let's go ahead and
15 procedurally, on the record in front of the jury
16 finalize everything I've just said.

17 Mr. Canales, what says the Defense as to
18 your client Mr. Mesquias?

19 MR. TONY CANALES: The Defense for
20 Mr. Rodney Mesquias rests, Your Honor.

21 THE COURT: Thank you, Mr. Canales.

22 Mr. Cyganiewicz on behalf of Mr. McInnis?

23 MR. CYGANIEWICZ: We also rest, Your Honor.

24 THE COURT: Mr. Guerra, on behalf of
25 Dr. Pena?

1 MR. GUERRA: Your Honor, on behalf of
2 Defendant Dr. Pena, we rest.

3 THE COURT: Thank you, gentlemen.

4 MR. GUERRA: Thank you, Your Honor.

5 THE COURT: Mr. Lowell, based upon the
6 announcements of counsel, what says the Government?

7 MR. LOWELL: Thank you, Your Honor.

8 The Government rests.

9 THE COURT: Thank you, gentlemen.

10 All right. Ladies and gentlemen, now you
11 heard the formal announcements, you've just heard my
12 instructions, have a pleasant day, relax, but tomorrow
13 you start your hard work in terms of deliberation.

14 All right? We'll see you, again, tomorrow
15 at 9:00 a.m.

16 COURT OFFICER: All rise for the jury.

17 (JURY OUT.)

18 THE COURT: Mr. Lowell, Sheila.

19 COURT REPORTER: Yes, sir.

20 THE COURT: Let's go back on the record.
21 Mr. Lowell, clarify your prior statement as to what says
22 the Government in terms of its case in chief.

23 MR. LOWELL: Government closes, Your Honor.

24 THE COURT: Thank you, Mr. Lowell.

25 All right. Gentlemen, do we have rough

1 drafts ready, or -- to -- to submit to the clerks in
2 terms of the charge?

3 MR. HECTOR CANALES: Yes, Your Honor. Can I
4 talk to the clerk -- may I speak to the clerk?

5 THE COURT: Let's go ahead -- these are my
6 two clerks, Sandra is, as you already know, the second
7 Judge, get everything to them and let's get -- let's get
8 to work.

9 COURT OFFICER: All rise.

10 (COURT IN RECESS.)

11 MR. CYGANIEWICZ: Well, first of all, we had
12 filed a --

13 THE COURT: One second, one second.

14 MR. CYGANIEWICZ: Sorry, Judge.

15 THE COURT: Sheila, let me know when you're
16 ready.

17 COURT REPORTER: I'm ready.

18 THE COURT: All right. Go ahead.

19 MR. CYGANIEWICZ: On behalf of Mr. McInnis
20 we had filed previously proposed jury instructions, but
21 I think everything we filed was already included in
22 Mr. Canales' original filings.

23 The only really other reason I wanted to get
24 on the record, I want to make sure that -- can we have
25 an understanding that all of the requests by Mr. Canales

1 on behalf of Mr. Mesquias, Mr. McInnis is joining and
2 adopting, and any rulings by the Court on requested jury
3 charges regarding a request by Mr. -- Mr. Canales, we'd
4 like -- to have the understanding that's also a ruling
5 against the other Defendants.

6 So we're basically letting Mr. Canales take
7 the lead on the jury instructions, we'll have the same
8 requests, and I want the same requests adopted by -- for
9 Mr. McInnis and the same rulings, Your Honor.

10 THE COURT: Understood.

11 MR. GUERRA: And on behalf of Defendant
12 Pena, we -- we join in that request as well, Your Honor.

13 THE COURT: All right.

14 MR. CYGANIEWICZ: And everything we have
15 requested is already presented to the Court on file.

16 THE COURT: All right.

17 MR. GUERRA: And for Defendant Pena the
18 same, Your Honor.

19 THE COURT: All right.

20 Mr. Lowell, where are we with the
21 Government's prospective charge?

22 MR. LOWELL: Your Honor, we did submit a
23 complete set. I believe we made some slight amendments
24 to it over the weekend and we're submitting that to the
25 Court in just a few minutes.

1 THE COURT: All right. So back to -- and
2 just in terms of the timeline, the clerks should have
3 everything within the next few minutes, next 15 minutes,
4 at least -- at the latest, correct?

5 MR. TONY CANALES: Yes, they have it
6 already, Your Honor.

7 THE COURT: Very good.

8 MR. LOWELL: Yes, Your Honor.

9 MR. TONY CANALES: And he's nodding his
10 head.

11 THE COURT: No, no, no. I wanted to
12 finalize the submission of everything, almost,
13 basically, immediately which if you need 15 minutes
14 that's fine.

15 Anything else, gentlemen?

16 MR. LOWELL: No, Your Honor.

17 THE COURT: All right. And as I said, the
18 individual Defendants are free to leave if they so
19 desire.

20 All right. We'll be in recess.

21 (COURT IN RECESS.)

22 THE COURT: Thank you, everyone. Please be
23 seated.

24 Gentlemen, the Court has concluded the final
25 draft of the jury charge, but we are literally making

1 nine copies for each respective attorney. So while the
2 copy machine is working, I thought we would be efficient
3 to, at least, address the -- the Government's Motion in
4 Limine.

5 At this time, the Court is ready to make its
6 Motion in Limine unless there's further argument
7 requested by either side?

8 MR. GUERRA: Not on the defense, Your Honor.

9 THE COURT: All right. Gentlemen, as to the
10 Motion in Limine, the -- the Court will grant the
11 Government's Motion in Limine on the issue of selective
12 prosecution.

13 Court finds that the record is undisputed
14 and the Court confirmed that the Defense did not file a
15 motion requesting that issue pursuant to Rule 12(b)3(a)4
16 so the Court grants the issue as to not making any
17 arguments to the jury suggesting -- suggesting selective
18 prosecution.

19 However, the Court will slightly amend the
20 issue on the -- with respect to the testimony of
21 Ms. McCauley, obviously the Defense is instructed not to
22 make arguments that the Government must have or should
23 have pursued a civil or administrator matter, but
24 Ms. McCauley did testify that there were options
25 available which included the administrative option and

1 civil option as part of the investigative -- the
2 Government's discretion to investigate.

3 That testimony is part of the record, so if
4 the Defense wants to reference Ms. McCauley's testimony
5 as to the options available to the Government, even
6 though they're not mutually exclusive, the Defense --
7 the Court would grant that issue. But statements saying
8 that the Government should have done any of those other
9 options would not be allowed.

10 Anything else on that issue?

11 MR. CYGANIEWICZ: No, Your Honor.

12 MR. LOWELL: Just --

13 THE COURT: And am I pronouncing her name --
14 was it --

15 MR. GUERRA: McMillan, Your Honor.

16 THE COURT: Did I -- I think I said
17 McCauley, I'm sorry, McMillan.

18 What's her full name, Laurie?

19 MR. LOWELL: Laurie McMillan.

20 THE COURT: Laurie McMillan. Forgive the
21 error, Sheila, I meant Laurie McMillan.

22 All right. Gentlemen, as I said we should
23 have those -- the drafts. I'll give you just a little
24 bit of time -- well, I'll give you a reasonable amount
25 of time to go through them.

1 If the parties agree on a deletion, or if
2 the parties agree on an insertion, the Court will
3 consider it, otherwise, I'll hear your objections
4 shortly. But I want to give you some time to review it.

5 So let's get those -- let's get to that next
6 stage.

7 Mr. Canales, you had referenced that you
8 wanted to bring up some miscellaneous matters to the
9 Court as well, not having to do with the jury charge?

10 MR. TONY CANALES: That's fine. Maybe just
11 at the end it would, I think prudence dictates that we
12 make another Motion for Judgment of Acquittal on the
13 sufficiency of evidence, even though we rested and there
14 was no counter evidence at all, but I think there's some
15 case law that if you don't do it again we might consider
16 it be waived, so at some point in time when it's all
17 said and done.

18 THE COURT: Would you like do it now while
19 we're killing some trees or --

20 MR. HECTOR CANALES: Sure. We can do -- we
21 can do -- we can do it now.

22 THE COURT: I mean, literally it's going to
23 take some time to get those nine copies out, so we have
24 some time.

25 MR. TONY CANALES: My lawyer is going to

1 make the argument, Mr. Canales.

2 THE COURT: And gentlemen, out of an
3 abundance of caution before you make those motions,
4 you're waiving -- you're waiving the appearance of your
5 clients?

6 MR. TONY CANALES: Yes.

7 THE COURT: While you make those; is that
8 correct?

9 MR. HECTOR CANALES: Yes, Your Honor, that
10 is correct?

11 MR. GUERRA: Yes, Your Honor, that's
12 correct.

13 THE COURT: All right.

14 MR. CYGANIEWICZ: Judge, we're also asking,
15 again, that we could adopt the argument by Mr. Canales
16 on behalf of Mr. McInnis, and I'm sure the other
17 Defendants, instead of repeating the same arguments,
18 we'd like a ruling regarding all Defendants, and we're
19 requesting the same remedies and relief that Mr. Canales
20 will be requesting, Your Honor.

21 THE COURT: That is granted in -- in -- and
22 if you wish to supplement, that's fine, if you wish to
23 say ditto that's fine as well.

24 Are you ready, Mr. Canales?

25 MR. HECTOR CANALES: Yes, Your Honor. Thank

1 | you, Your Honor.

2 Hector Canales on behalf of Rodney Mesquias.

3 At this time, Your Honor, we -- we reurge the Motion or
4 Judgment for Acquittal that Defendants made at the close
5 of the Government's case in chief, and we reurge those
6 based on the same grounds.

7 And we'd like to highlight, Your Honor, in
8 that motion that -- and those are as to all counts that
9 Mr. Mesquias is -- is indicted on, including the
10 indictment, superseding indictment.

19 We'd also point out to the Court that the
20 evidence that came from, in particularly the
21 Government's last witness, Mr. Petron, that that
22 evidence of -- of claims data is -- is insufficient to
23 establish any fraud, and that it -- and it's limited in
24 nature.

25 And also at this point, I'd like to bring

1 up, I think that this is the instance where we had a
2 discussion with the Court earlier about a limiting
3 instruction as it relates to that claims data.

4 One second here. Let me find where my --
5 the -- under -- under Ganji, clearly liking Ganji, the
6 Court would like the -- certainly this jury and this
7 Court to infer guilt from those numbers, from the
8 \$150,000,000, from all of the other summary evidence
9 that Mr. Petron put on in their -- in his -- in his
10 testimony.

11 However, the Fifth Circuit says that in that
12 situation that the most a jury could infer from this
13 evidence was that, instead of having -- that is a
14 preference for doctors referring their patients to a
15 home health care agency, or to a hospice agency in which
16 they are a medical director and receiving medical
17 director fees.

18 Ms. McMillan testified, the Government's
19 expert, that such a relationship was only properly, but
20 in fact, under the rules and regu -- Medicare
21 regulations, a hospice agency and home health agency are
22 required to employ a medical director.

23 Thus, Your Honor, there is insufficient
24 evidence to support an agreement, or a conspiracy simply
25 by inferring it from the fact that doctors, such as

1 Dr. Virlar or Dr. Carrillo, were referring patients of
2 theirs to a -- to a hospice in which they are home --
3 which they're a medical director.

4 This would also apply to Dr. Gonzaba,
5 Dr. Pelly, Dr. Escamilla, all the doctors that have been
6 mentioned in this case and, therefore, since that
7 activity, in and of itself, the referrals, is not
8 illegal, it is -- it is, according to the Fifth Circuit,
9 that evidence of those numbers is insufficient to
10 sustain any inference that Rodney Mesquias and those
11 doctors, in particular Dr. Virlar, that that is evidence
12 of an agreement to defraud Medicare.

13 We would request, in addition to the
14 Judgment of Acquittal, in the alternative, that the
15 Court instruct the -- the jury, as it is indicated you
16 would in the charge, as to the limitation of this claims
17 data and this information, specifically, that such
18 information is not evidence of a conspiracy or
19 sufficient to prove a -- a conspiracy.

20 One second, Your Honor.

21 As the Court knows, one cannot negligently
22 enter into a conspiracy, and furthermore, Your Honor,
23 there is no evidence, or insufficient evidence that a
24 reasonable jury could find guilt beyond a reasonable
25 doubt that my client, Rodney Mesquias, knew that the

1 claims submitted were of fraudulent claims.

2 Again, in -- in Ganji, the jury may not
3 infer -- if -- if -- the jury may not infer from
4 evidence of a -- of a claim and stretch that inference
5 of evidence of a -- of a false claim into a second
6 inference that my client, Mr. Mesquias, knew that that
7 patient was not -- was not terminal.

8 So there are two steps here. First, that
9 the Government, one, I don't believe they even met step
10 one, which is to prove that the claims, for instance in
11 Counts Two through Seven, that those claims themselves
12 were fraudulent, that they were not terminal. I think
13 the evidence does not support that.

14 Even if it does, however, that fact in and
15 of itself does not -- you can't stretch that into the
16 second step, which would be to prove that the individual
17 Defendants knew that that claim was fraudulent, that
18 they were not terminal.

19 And so we would submit to the Court that
20 a -- an acquittal is proper on that grounds, one.

21 Counts Two to Seven, there are no, we think
22 they can't show that those were false claims because
23 it's the opinion, it's left down to the opinion of --
24 you have a dispute between, for instance, in Count Two,
25 where Count Two was certified by Dr. Gonzaba and you

1 have a Dr. Virlar saying no.

2 And so that's simply a -- a difference of --
3 of -- of medical judgment, which cannot support a
4 finding of -- of fraud.

5 If somehow or another you get over that
6 hurdle, then there's no evidence you can't take that
7 inference and apply it to make another inference of
8 intent, willful intent or knowledge of it.

9 My client did not sign a single
10 certification.

11 So based on that, Your Honor, we would
12 respectfully request that the Court dismiss all counts
13 against Defendant Mesquias, and I think on behalf of the
14 other Defendants against all other Defendants as well.

15 THE COURT: Thank you, Mr. Canales.

16 Does -- Mr. Cyganiewicz anything you want to
17 add?

18 MR. CYGANIEWICZ: Judge, I -- I would also
19 like to adopt Mr. Canales' argument on behalf of
20 Defendant McInnis and again ask the Court to grant a
21 Motion of Acquittal on -- as to Mr. McInnis on Counts,
22 One, Two through Seven, Eight and 11 for those reasons
23 explained by Mr. Canales, and also in addition, the
24 Government has failed to prove all the elements of all
25 those offenses beyond a reasonable doubt and we'd ask

1 for a Court's ruling granting a Motion for Directed
2 Verdict of Acquittal.

3 THE COURT: Mr. Guerra?

4 MR. GUERRA: Your Honor, on behalf of
5 Defendant Francisco Pena, we incorporate the arguments
6 and adopt the arguments made by Mr. Canales and
7 Mr. Cyganiewicz on behalf of Dr. Pena and move, once
8 again, and reurge our Motion for Acquittal on Counts
9 One, Three, Eight, Nine, Ten and 12. And in particular,
10 we do adopt the arguments made by Mr. Canales with
11 reference to United States v Ganji.

12 We also move for a -- our Motion for
13 Acquittal on Count 12, which is the Anti-Kickback
14 Statute given that is duplicative of conspiracy counts
15 and alleged by the Government in Count One.
16 Specifically, Subparts I and J, which, basically outline
17 as part of a conspiracy an artifice to accept kickbacks
18 for referrals which goes to the heart of Count 12 which
19 is the Anti-Kickback Statute.

20 We believe it's duplicative and would cause
21 confusion for the jury, it's another just crack at the
22 apple for the Government; so for that reason,
23 Your Honor, we also move that on behalf of Dr. Pena be
24 acquitted -- the -- a Motion for Acquittal for Count 12
25 as well.

1 Thank you, Judge.

2 MR. TONY CANALES: Just to help counsel, he
3 said -- he said duplicitous. It's not duplicitous, I'll
4 submit to the Court, it's -- it's multiplicity.

5 MR. GUERRA: I said duplicative. I would
6 never accuse the Government of being duplicitous,
7 Your Honor, I said duplicative.

8 MR. TONY CANALES: The issue then -- bring
9 it up because this was my idea. Count One, Count One is
10 a subpart, has Subpart I.

11 And on Count One Subpart I talks about a
12 part of the conspiracy is to be able to pay the
13 kickbacks, kickbacks and also to pay for the
14 face-to-face.

15 Then we go down to -- that's what they
16 allege. Then we go down to Count 12 and they allege the
17 same thing, another conspiracy. Count One's a
18 conspiracy count, Count 12 is also a conspiracy count.
19 Alleging the same events that -- that are alleged in
20 the -- in the first count.

21 I think that falls under the so-called
22 theory of multiplicity which means that you're being
23 charged for the same -- in two different counts -- for
24 the same -- for the same factual offense.

25 And I submit to the Court that I think it's

1 error for the Court to allow this and we ask the Court
2 to dismiss Count 12 because that's a smaller conspiracy
3 versus the bigger conspiracy on Count One.

4 So I submit to the Court that Count 12 is --
5 is multiplicity of the first count, so we ask the Court
6 to dismiss Count 12, Your Honor, on behalf of all
7 Defendants.

8 Thank you, Your Honor.

9 THE COURT: The Court understands the
10 distinction between multiplicity, duplicative
11 and duplicitous.

12 MR. GUERRA: Thank you, Your Honor, I
13 appreciate that.

14 THE COURT: All right. Mr. Lowell,
15 Government's response, please?

16 MR. LOWELL: Thank you, Your Honor.

17 So as to Mr. Mesquias's arguments with
18 respect to Mr. Petron who testified he was the last
19 Government witness in this case, he testified about the
20 claims data.

21 As the Court will recall, Mr. Petron walked
22 through the claims data the total billed paid, the kind
23 of services that were submitted, he was able to tie
24 those claims to Dr. Francisco Pena who was able to tie
25 those claims to specific entities that were owned and

1 controlled and/or controlled by Rodney Mesquias and
2 Henry McInnis.

3 That testimony reinforces, corroborates,
4 supports the numerous witnesses who worked for these
5 companies who described the fraud.

6 What Mr. Petron gave the Court and gave the
7 jury was hard data that supported the testimony, the
8 observations by the employees who worked for this
9 company in real time.

10 And just in addition to that, Your Honor, it
11 was part of this scheme that Henry McInnis and Rodney
12 Mesquias directed others, including Dr. Carrillo,
13 including Dr. Virlar to rubber-stamp these fraudulent
14 and false orders to promote and expand the fraud.

15 And so as to Rodney Mesquias, as to the
16 specific charges in this case, viewing the evidence in
17 the light most favorable to the Government, Defendant
18 Mesquias cannot meet, as he must, the demanding standard
19 under Rule 29.

20 As to Henry McInnis, same -- same set of
21 facts. Rodney Mesquias, Henry McInnis working together
22 as the number two -- number one and two in the company
23 respectively, directed others, nurses, doctors and other
24 employees to carry out this fraud. The specific claims,
25 Counts Two through Seven are -- are discreet, specific

1 executions of that fraud and they're consistent with the
2 broad directives that they would give to employees and
3 give to doctors to falsify claims. Those are just
4 examples of those directives.

5 Finally, as to Francisco Pena and the -- the
6 argument about the conspiracies, we have two different
7 statutes. We have a conspiracy to violate the -- the
8 1349, which is the health care fraud conspiracy, and
9 then we have a conspiracy to violate Title 42, which is
10 the Anti-Kickback Statute, two totally different
11 statutes, different elements, different sets of facts
12 that we have to offer and prove.

13 I will say that as to the health care fraud
14 conspiracy, it was a part of that conspiracy to refer
15 patients, it was part of the conspiracy to send
16 patients, but the Government, particularly in this
17 district and in the Fifth Circuit routinely alleges that
18 it's part of the manner and means of a health care fraud
19 conspiracy to refer patients, to pay kickbacks to
20 doctors to refer those patients.

21 And so, Your Honor, two different statutes,
22 we don't have a multiplicity issue here.

23 THE COURT: Thank you, Mr. Lowell.
24 Gentlemen, each --

25 MR. HECTOR CANALES: Your Honor, just for

1 the record, if you would indulge me.

2 THE COURT: Sure.

3 MR. HECTOR CANALES: The -- the claims data
4 in the exhibits, the \$150,000,000, and really all of
5 Mr. Petron's testimony, the Court will recall, was
6 admitted over the objections of Defendants at pretrial.

7 All the exhibits, the 37 pages or so that we
8 went over, all of the claims data, the A series exhibits
9 as they have -- have been admitted, Defendants objected
10 to those, Your Honor. Namely, because they went outside
11 of -- on -- on relevancy, and also on *Daubert* grounds as
12 well.

13 Because, Your Honor, as you might recall
14 with his testimony, although Mr. Petron was a
15 statistician, he was not offered as an -- as an expert,
16 and he did not provide any statistical analysis in this
17 case.

18 He did, however, on cross admit that the six
19 patients that make up Counts Two to Seven were not the
20 product of a random eyed sample.

21 And so, therefore, Your Honor, there is zero
22 evidence, there is zero competent evidence that -- that
23 these six patients are representative of the entire
24 9,339 patient population that's out there.

25 As such, under *Daubert*, under the Asera case

1 out of the 11th circuit, also out of the -- the Wall
2 case I cited in our previous oral motion from the Chief
3 Judge out of the Northern District, and it's just a
4 basic tenant of evidence, no statistic -- no -- no
5 extrapolation may be made from these six to the entire
6 whole.

7 And that's why we had the objection to even
8 be able to offer this -- all of this other claims data
9 because there is no way -- the Government, if they want
10 to prove \$100,000,000, then they have to prove it either
11 one of two ways; by proving each and every patient being
12 false, that obviously is a monumental task, but they
13 still could do it; or, in lieu of that, the Courts have
14 recognized a statistical extrapolation.

15 That was not done here. So it is -- I want
16 to make clear for the -- for the record that all that
17 evidence was admitted, and any evidence as it relates to
18 the six cannot be extrapolated to the whole and, again,
19 Your Honor, that was part of the reason -- that was the
20 reason we asked for that limiting instruction because,
21 if not, what the Government is trying to do is simply --
22 is to make that inference, oh, 70 percent, 80 percent
23 and throw this number up there and use that -- those --
24 these general numbers to confer a conspiracy, to confer
25 actual fraud, to confer a kickback and they simply have

1 not met the -- they don't have the -- they haven't done
2 the work to do that.

3 And so we would object, again, to that
4 introduction and also incorporate that as part of our
5 motion.

6 Thank you for indulging me, Your Honor.

7 THE COURT: Any final comments, Mr. Lowell?

8 MR. LOWELL: Your Honor, I would just -- I
9 would just note, if I may, that I believe counsel's
10 conflating the sentencing phase with the punishment
11 phase.

12 The Government is not required to prove
13 specific loss at this stage of the proceeding.
14 There's evidence that's in the record that indicates
15 that the loss is substantial, but the Government, of
16 course, is not required to prove loss at this specific
17 stage of the proceeding.

18 MR. HECTOR CANALES: It's an evidentiary
19 point, Judge, in -- in this matter.

20 THE COURT: Thank you, gentlemen. All
21 right, gentlemen respectfully, each of the respective
22 defense motions is denied.

23 I believe -- I believe you've each been
24 handed the final jury instruction. Please take a very
25 brief moment to review them, formalize your objections.

1 If the parties agree on any deletion or
2 insertion, the Court will consider it.

3 The Court will reconvene momentarily.

4 MR. TONY CANALES: Well, I beg your pardon,
5 Judge, I've been trying to read as fast as I can since I
6 got a copy of the proposed instructions.

7 There's a question that I have. You keep
8 talking about as charged in the indictment. Is the
9 Court going to submit the indictment to the jury,
10 Your Honor? I don't think you should.

11 We would object to the Court giving a copy
12 of the indictment to the jury, Your Honor. Everything
13 should be in the charge not in the indictment.

14 THE COURT: The Court has no plans to -- to
15 submit the indictment.

16 MR. TONY CANALES: Thank you very much,
17 that's all I wanted to hear, Your Honor.

18 THE COURT: Thank you.

19 MR. TONY CANALES: Thank you.

20 THE COURT: Only the exhibits will be going
21 to the jury and the jury charge.

22 (COURT IN SHORT RECESS.)

23 THE COURT: Thank you everyone. Please be
24 seated.

25 Gentlemen, are the parties ready to proceed

1 with their respective objections to the jury charge?

2 MR. TONY CANALES: Your Honor, Tony Canales
3 on behalf of Mr. Mesquias, Your Honor.

4 Let me give my objections and to -- in two
5 parts.

6 THE COURT: All right. Well, no -- well,
7 before we begin, ready with your objections?

8 MR. LOWELL: Yes, Your Honor.

9 THE COURT: Everybody else? Yes?

10 MR. GUERRA: Yes.

11 MR. CYGANIEWICZ: Yes, Your Honor.

12 THE COURT: All right. Let's proceed with
13 your objections, Mr. Canales.

14 MR. TONY CANALES: So I can kind of dispose
15 of something that we -- to be pretty clear.

16 We object to the Court's failure to include
17 in the jury charge our proposed jury instruction, for
18 example, that we submitted on -- on the 07/19/19 at
19 document number 242.

20 In that -- in that particular matter,
21 Your Honor, what we -- I -- I requested of the Court and
22 the Court has not -- obviously, the Court has not given
23 it to me, therefore, I submit the Court has committed
24 error in not giving it to me. It's the one that says,
25 good faith defense of charge of intent to defraud. I

1 submitted that the Court, the Court -- I would ask the
2 Court to sign my proposed instruction by saying denied.

3 We also object to the Court's failure again
4 on the -- on the docket entry file 242 where we had a
5 requested instruction regarding how to meet the burden
6 of proof in Counts Two to Seven and the Court did not
7 provide that one. We ask the Court to sign refuse.

8 While I'm there, Judge, you -- the Court's
9 charge does not describe or detail the specifics of
10 Counts Two through Seven as to the dates of treatment of
11 the patients, nor the hospice care or the dates.

12 All you say on Counts two is that a fraud
13 was committed on a particular patient without giving a
14 description of the time or date.

15 I submit to the Court the Court's failure to
16 give us a description as alleged in the indictment, as
17 what the jury heard, that is, for example, for -- for
18 each one of them, you would have a particular date of
19 certification and so forth, and the Court has not done
20 that. I think -- I think the Court should do that and
21 we believe it's the failure to say that in the charge, I
22 think is error, and we request the Court provide at
23 least the -- the chart that was part of the indictment.

24 And I do not see that, so we request also --

25 THE COURT: Well, one second, Mr. Canales.

1 Again, it appears that you have more than -- let --
2 let's break this up into bits and pieces, or at least --
3 not bits and pieces, but for each objection, obviously I
4 want to give the Government --

5 MR. TONY CANALES: Oh.

6 THE COURT: -- an opportunity to respond and
7 then we'll go onto each objection. So before you move
8 on to your next objection, are you finished with what
9 you were just saying on that one?

10 MR. TONY CANALES: Yes, I finished on the
11 very first one was the issue of the -- the good faith
12 defense to the charge of intent to defraud.

13 THE COURT: All right. Government's
14 response to that issue, please.

15 MR. LOWELL: Your Honor, on the good faith
16 defense, the Government objects to this -- to this
17 instruction.

18 There's been no evidence, no facts in the
19 record to support that the Defendants had an honestly
20 held belief, or honestly formed belief that would
21 mitigate or undermine intent in this case. There's just
22 been no evidence of that.

23 THE COURT: So, again, let's -- before we
24 move on to your next one, that specific objection is
25 overruled.

1 MR. TONY CANALES: Very well.

2 THE COURT: Next objection?

3 MR. TONY CANALES: Yes. I would ask request
4 the Court, at some point in time for housekeeping
5 matters, for the Court enter the -- sign the -- sign the
6 request as -- as refused. And it's under docket number
7 242, Your Honor. Or I can -- I can bring the Court a
8 clean copy tomorrow.

9 THE COURT: Yeah, the Court is happy to
10 issue an order on when it overrules, but it's part of
11 the record as well so --

12 MR. TONY CANALES: Very well.

13 THE COURT: Please proceed with your next
14 objection.

15 MR. TONY CANALES: The next one, Judge, is
16 the -- is my request for a more detailed instruction
17 regarding what was submitted docket number 242 request
18 instruction number two. And that's, again, it's -- it's
19 more detailed as to how -- what is it that needs to be
20 proven as to Count Number Two.

21 What the Court has -- what the Court has
22 done, I submit to the Court, is incomplete. The Court's
23 proposed jury charge does not mention at all any
24 specific dates, any specific hospice matters, or any --
25 all it does is says Count Two charges Defendant Rodney

1 Mesquias with health care fraud in connection with
2 Medicare beneficiary Jack High and then each one of
3 them.

4 But that's not the way the theory of the
5 case went, that's not the allegation of the indictment,
6 and that's not what came in. What came in was whether
7 or not it was a hospice issue, a proper certification on
8 a particular date.

9 And I submit to the Court that those dates
10 are the dates that are alleged in the indictment for
11 Count Two through Count Seven respectively.

12 So I submit to the Court the Court's
13 failure -- the Court's failure to bring the detail of
14 that matter, I think is depriving us of -- of what the
15 charge is supposed to be, and we object to the Court's,
16 one, failure to include it; and second, failure to
17 include my requested charge as requested number --
18 instruction number two, Your Honor.

19 THE COURT: Government's response, please?

20 MR. LOWELL: Your Honor, we have no
21 objection to adding the specific dates of the claims or
22 the certification periods to that portion of the
23 instruction.

24 THE COURT: Well, then, gentlemen, did you
25 have a -- let -- and I -- I understand that -- that -- I

1 mean, we're on somewhat of a time constraint.

2 Is there any issue -- did you have a chance
3 to discuss this before we started to place things on the
4 record?

5 MR. LOWELL: Not -- not --

6 MR. TONY CANALES: Shortly. Very briefly,
7 Judge.

8 THE COURT: All right. Let me -- back to
9 what I said initially, if there are any issues that the
10 parties are in agreement with be either inserted or
11 deleted, the Court will be happy to -- to do so.

12 So if -- as in this particular instance,
13 it's now come to my attention both parties want dates
14 entered that were not entered, the Court will -- will do
15 so.

16 MR. TONY CANALES: Well, I -- I would
17 suggest that all we have to do is just copy what's in
18 the indictment, the -- the items two -- Counts Two to
19 Seven because they've got the dates and the
20 certification periods and everything else.

21 That's what I'm suggesting.

22 THE COURT: Gentlemen, again, Mr. Lowell?

23 MR. LOWELL: Again, we have no -- we have no
24 objection to adding the dates and its information from
25 that chart to that specific portion of the jury

1 instruction.

2 MR. HECTOR CANALES: We also need to just
3 inquire, include it in the verdict form as well as to
4 those particular counts, not just in the instructions
5 but then in the actual question that's going to be
6 answered we need to make sure it's in there as well.

7 MR. TONY CANALES: In the verdict form,
8 Your Honor.

9 THE COURT: Again, gentlemen, if you all
10 agree -- it's the Court's charge, but if you agree -- if
11 both parties agree the Court will be happy to enter the
12 chart wherever you mean appropriate.

13 MR. TONY CANALES: May I suggest, Judge,
14 that on this particular issue let me draft something
15 tonight, or this afternoon, I can e-mail it to him and
16 I'm more than sure he and I can agree to it and come
17 back to the Court early tomorrow morning with a --

18 THE COURT: The clerks will be -- let's do
19 this, I mean, I don't know how many issues you're going
20 to agree on, but hypothetically, I think one of my
21 clerks can get to work on inserting a chart right now
22 while we speak as we move on.

23 MR. TONY CANALES: Very well.

24 THE COURT: You all flip a coin and go
25 insert the chart where appropriate.

1 All right.

2 MR. TONY CANALES: The next -- the next --

3 THE COURT: Wait, wait, procedurally,
4 though, the objection in terms of -- of inserting the
5 chart as requested with respect to the dates is
6 sustained, or -- whether you want it withdraw it as
7 something agreed to, or you want me to sustain it?

8 MR. TONY CANALES: Let's see how it comes
9 out, Judge, and then we'll ask the Court to rule on it.

10 THE COURT: For the time being -- for the
11 time being let's pass on your objection on that, and you
12 can read the draft that we submit to you including the
13 charge, all right?

14 MR. TONY CANALES: Yes, Your Honor.

15 THE COURT: All right.

16 Next objection, please.

17 MR. TONY CANALES: In that regard, we also
18 have submitted to the Court a docket number 242, the
19 Defendant's requested instruction number three which we
20 call the safe harbor theory of defense.

21 And the Court has not at all mentioned at
22 all our safe harbor defense that goes to Count 12 of the
23 indictment, Your Honor.

24 And we believe we're entitled to the safe
25 harbor defense and we -- we have submitted to the Court

1 a proposed jury instruction on it, and the Court -- the
2 Court has not granted it, has not listed any type of
3 safe harbor theory of defense in the Court's charge and
4 we -- we object to it and we think we should have a -- a
5 safe harbor defense -- theory of defense in the case as
6 to Count 12, Your Honor.

7 THE COURT: All right. Mr. Lowell?

8 MR. LOWELL: Your Honor, the Government
9 objects. There's been no foundation laid for the
10 insertion of a safe harbor -- safe harbor defense in
11 this case.

12 MR. HECTOR CANALES: Your Honor, if I may --
13 if I may -- if I may address that.

14 Within the exhibits that were admitted to
15 the -- in the Court, Mr. Mesquias' Exhibits, we have
16 numerous medical directorship agreements that meet the
17 standard of the safe harbor, and that is you have a
18 medical directorship agreement that's in writing, it's
19 for more than one year and it specifies a fee, the
20 testimony in this case is that the -- those fees are
21 \$250 an hour.

22 The testimony in this case has been that,
23 one, McMillan established the -- the standard and that
24 such payments made pursuant to are not kickbacks,
25 pursuant to the Anti-Kickback she testified that she was

1 familiar and knew and that was part of her -- her
2 background was on safe harbor Anti-Kickback.

3 We also had testimony from Dr. Virlar about
4 other agreements that he'd entered into to establish the
5 market rate and that, in fact, the payments made for
6 those face-to-face services of \$200 an hour and the 250
7 in the contracts were either at or below market rate
8 compared to his agreements that he had with Altus
9 Hospice and CIMA Hospice where they were paying for the
10 same thing under a same written agreements with -- with
11 more.

12 So there's been more than enough evidence
13 from the Government's witnesses, and from our own
14 exhibits that the Court admitted to establish safe
15 harbor in -- instruction. To do -- to leave that out,
16 Your Honor, would be extremely prejudicial, it would be
17 wrong and -- and -- and in error.

18 MR. GUERRA: And, Your Honor, Robert Guerra
19 here for Defendant Francisco Pena.

20 The Government has elicited testimony from
21 its own witnesses regarding how these medical -- medical
22 directorship agreements could be an artifice, or a veil
23 for fraud. And in specific they asked Neal Williams how
24 these could be dressed up as some sort of a way to hide
25 kickbacks.

1 If -- if the jury believes that these are
2 legitimate medical directorship contracts, and as -- as
3 Mr. Canales pointed out Laurie McMillan testified as to
4 what the standards are, then the jury should be allowed
5 to consider the safe harbor defense as part of this
6 instruction.

7 So for those reasons, on behalf of Dr. Pena,
8 we join in the arguments by counsel for Mesquias and
9 request such an instruction be made to the jury as part
10 of this charge.

11 THE COURT: Anything else, Mr. Canales?

12 MR. TONY CANALES: No, Your Honor. And for
13 the record, that's file, again, instruction number three
14 in our -- filed on 07/19/19 document -- document number
15 242 called safe harbor theory of defense.

16 And so we submit it to the Court a -- a
17 proposed jury charge and the Court has not provided in
18 your Court's submission, so I'll take it as being
19 denied, Your Honor.

20 THE COURT: Mr. Lowell, Government's
21 response?

22 MR. LOWELL: Your Honor, we would ask just
23 for some additional time to study the language of this
24 instruction, give it a closer read, and then report back
25 to the Court whether we -- we object to it or withdraw

1 our objection.

2 THE COURT: All right. We'll -- we'll pass
3 on that as well momentarily.

4 All right.

5 MR. TONY CANALES: May I continue,
6 Your Honor?

7 THE COURT: The Court will take it under
8 advisement. As I said, if the parties agree upon it, we
9 can amend the charge momentarily.

10 Next objection, please.

11 MR. TONY CANALES: Yes, Your Honor.

12 Again, under docket number 242 filed on July
13 19th, '19, we have Defendants requested instruction
14 number four. We submitted to the Court -- we submitted
15 this request for the Court to consider as an instruction
16 to consider, the Court has not included in its proposed
17 charge, it reads something like this, Your Honor, real
18 quick like: The violation of a civil Medicare or
19 Medicaid regulation, if such a violation occurred, is
20 not a criminal offense.

21 You're only to decide whether the Government
22 has proved beyond a reasonable doubt that the Defendant
23 committed a criminal offense charged in the indictment.

24 Violations of internal procedures, standards
25 or rules are not crimes. You may consider known

1 violations of these rules as you would any other
2 evidence in determining whether the Government has
3 demonstrated the Defendant's specific intent to violate
4 the criminal law.

5 I submit to the Court that that's -- we
6 should have that instruction, the Court has -- obviously
7 has not -- has refused it, Your Honor, and if that's so,
8 I ask for the Court for a docket order that you're
9 refusing this instruction.

10 THE COURT: Government's response, please.

11 MR. LOWELL: Again, Your Honor, we
12 respectfully ask for some additional time to review the
13 language in this instruction.

14 THE COURT: All right. We'll take it under
15 advisement.

16 MR. TONY CANALES: Okay. Next, Your Honor,
17 may I?

18 THE COURT: Please.

19 MR. TONY CANALES: Again, this is the -- the
20 Court will find -- find this filed July 19th, '19 --
21 '19, document number 242 of the Defendant's requested
22 instruction number five.

23 This -- our title for this is called
24 violation of interpretive rules and policies. It's a
25 long, long two-page document. I don't think I have to

1 read to the Court, it's there already, but it basically
2 is that they're -- it says the following in summary.

3 THE COURT: Let me do this, let me
4 interject. Let me -- this is what I'm going to do. I'm
5 going to take another recess.

6 Gentlemen, as I said, use this time to
7 confer, I wasn't trying to rush you, I just -- I was
8 advised that you were ready.

9 MR. TONY CANALES: Well --

10 THE COURT: Why don't you go through those
11 pages with Mr. Lowell, see what you can agree to and
12 obviously, as I've already said, if the parties agree to
13 it, if it will -- it will greatly facilitate matters.

14 MR. TONY CANALES: Yes, Your Honor, we will.

15 THE COURT: Use this time to confer and just
16 let me know as soon as you're ready, all right?

17 MR. TONY CANALES: Yes, Your Honor.

18 MR. LOWELL: Yes, Your Honor.

19 THE COURT: We'll take a brief recess.

20 (COURT IN SHORT RECESS.)

21 THE COURT: The parties have handled --
22 excuse me, let's start over, Sheila.

23 The parties have handed me a portion of the
24 Defendant's requested instruction number three. They're
25 obviously conferring on other issues, but for the

1 purpose of time the Court will say that the language on
2 page 5 of said instruction is -- is granted.

3 The majority in part, the Court is only
4 going to exclude -- well, let me -- let me mark it this
5 way. The parties have already agreed to paragraphs one
6 and two. The Court will allow that.

7 The parties disagree as to paragraphs three
8 and four, the Court, however, will overrule the
9 Defendant's objection and allow the defenses' insertion
10 of paragraphs three and four.

11 The Court will allow paragraph five.
12 Technically, the parties have already agreed to
13 paragraph five.

14 Paragraph six, the Court will disallow, and
15 then paragraph seven, its entirety, itemized as one
16 through seven, the parties have agreed upon.

17 So aside from paragraph six, the entirety of
18 the Defense request instruction number three will be
19 inserted into the jury charge where appropriate.

20 MR. TONY CANALES: Except for paragraph
21 number six, right?

22 THE COURT: Correct.

23 MR. TONY CANALES: Very well.

24 THE COURT: And that's an unofficial
25 numbering. Just count the paragraphs.

1 MR. TONY CANALES: Yes, Your Honor. I would
2 like to ask the Court to please reconsider, and we would
3 object to the Court's failure to include the following
4 language from that particular item, which is item number
5 document 242 filed 07/19/19, request number three: We
6 ask that the Court consider it and say the following,
7 and insert the following: The fact that a transaction
8 is not protected by statute, or exception, or regulatory
9 safe harbor, however, does not make the transaction
10 unlawful.

11 Even exception or safe harbor does not apply
12 to the transaction the Government must prove each and
13 every other element of the Anti-Kickback Statute
14 described in Count 12 of the indictment beyond a
15 reasonable doubt.

16 We request that particular language -- must
17 prove each and every element of the Anti-Kickback
18 Statute describe in Count 12 of the indictment beyond a
19 reasonable doubt.

20 We request the Court to include that,
21 Your Honor, and I understand the Court has said, no. We
22 note -- please note our objection.

23 THE COURT: Mr. Lowell, any response?

24 MR. LOWELL: Your Honor, briefly, we object.
25 That's argument that Mr. Canales can make to the jury.

1 THE COURT: Again, the Court respectfully
2 overrules that. Paragraph five literally states forth
3 the Defendant's burden of proof in terms of the elements
4 that it must prove beyond -- excuse me, that by a
5 preponderance of the evidence, and the proper segue to
6 the elements that it must prove by a preponderance of
7 the evidence are then listed in paragraph seven.

8 The Court finds paragraph six is a -- is a
9 segue that would confuse the jury. Having nothing to do
10 with the elements described in paragraph five.

11 All right.

12 MR. TONY CANALES: We are making progress, I
13 believe, and we are working right now, Judge, on the --
14 on the money laundering instruction.

15 THE COURT: That's fine.

16 Again, gentlemen, we're going to finish the
17 draft today, including your objections, let's -- let's
18 get through it. I think we're almost there.

19 But as I said, we'll work a little late, if
20 we have to, and my goal is to read the charge and
21 obviously, I'll take your objections, whatever, if any,
22 and whatever remaining they may be before we leave
23 today.

24 MR. TONY CANALES: Yes Your Honor.

25 THE COURT: All right. Let's take a quick

1 recess.

2 MR. LOWELL: Your Honor, could -- could we
3 lodge our -- our objections for the record?

4 THE COURT: Yes.

5 MR. LOWELL: Just go through them.

6 THE COURT: Let's -- in other words, we're
7 doing this -- I realize in partition because as we go --
8 but, yes, I'm assuming you want to object to the
9 insertions of paragraphs two, three and four?

10 MR. LOWELL: Yes, Your Honor, and we
11 addressed that.

12 What I was going do was just run through the
13 few objections that we do have to the instructions that
14 are in place right now.

15 THE COURT: All right. We can do that as
16 well.

17 MR. LOWELL: So on page 10 of the jury
18 instructions.

19 THE COURT: All right. Please proceed,
20 Mr. Lowell.

21 MR. LOWELL: Your Honor, the Government
22 objects to the evidence on Medicare claims instruction.
23 It reads: The Government -- it reads in part the
24 Government is not trying to infer that all claims
25 Medicare paid were fraudulent.

1 We would ask the Court, and we briefed this
2 issue, we would ask the Court to consider our
3 instruction that we proposed on September 9th, 2019.
4 We've submitted that instruction for the Court's
5 consideration and we think that instruction more
6 accurately captures the law on this point.

7 And so we've conferred with counsel, and our
8 understanding is counsel disagrees with the instruction
9 that we have proposed.

10 THE COURT: May you -- may I see the
11 instruction?

12 MR. LOWELL: Yes, Your Honor.

13 THE COURT: My note from my clerk was that
14 this was an attempt to -- all right.

15 The sentence that was proposed reads: The
16 Government is not required to prove, etcetera, and in
17 this statement it says the Government is not trying to
18 infer.

19 You're requesting that that first clause be
20 revised to read the Government is not required to prove
21 as opposed to -- is that correct?

22 MR. LOWELL: Yes, that's correct,
23 Your Honor. We'd respectfully request that the Court
24 adopt the entirety of the language in our proposed
25 instruction, but that seems to be the most important

1 part.

2 THE COURT: Well, gentlemen, let's take a
3 quick pause. Again, I -- I didn't see this in its
4 entirety. Let me read it very briefly.

5 Mr. Canales, or Mr. Guerra what's your
6 objections to any -- to the language as it exists right
7 now?

8 MR. GUERRA: Yes, Your Honor. Our objection
9 is this is the language, this is the issue with regards
10 to the limiting instruction that counsel and the Court
11 have been going over, basically, since the onset of
12 trial.

13 The -- the language inserted on page 10 that
14 the Government is -- is objecting to is, basically,
15 verbatim from the language that the Court gave in its
16 order on pretrial matters, document number 329, page 2,
17 item number two where the -- you know, as the Court is
18 well aware the Court said it will issue a limiting
19 instruction to the jury, that the Government is not
20 attempting to infer all claims Medicare paid were
21 fraudulent. The jury is to consider only the Medicare
22 claims alleged to be fraudulent.

23 That was in the Court's order on August
24 21st, 2019. We just ask that the Court issue a limiting
25 instruction consistent with its order on pretrial

1 matters.

2 And so for that reason, on behalf of
3 Dr. Pena, we object to the language being proposed by
4 the Government at this time.

5 MR. CYGANIEWICZ: Judge, I put up the
6 Court's order, document 329, that Mr. Guerra was
7 referring to.

8 THE COURT: All right. Gentlemen,
9 respectfully, the Court will -- to be quite frank --
10 sustain the Government's proposal and overrule the --
11 the Defenses' objection.

12 For whatever reason, and this -- as I stated
13 on numerous occasions, I did not mean for the language
14 in that order to be used as a jury instruction, but for
15 whatever reason, technically, that was basically what
16 was inserted with minor revisions.

17 But the Court does believe that the
18 Government's prospective paragraph is more specific in
19 scope starting without the need of the first sentence.

20 All right. Do we have the -- the draft of
21 what I submitted to counsel a week -- a week-and-a-half
22 ago that was -- I don't know if it was exactly the same
23 or slightly different?

24 MR. GUERRA: The proposed instruction,
25 Your Honor?

1 THE COURT: Yes.

2 MR. TONY CANALES: It's right here.

3 MS. ARCE-FLORES: It's right here. It's
4 right here.

5 MR. TONY CANALES: Yes.

6 THE COURT: May I see that? One second.

7 No, no, no, no, no. The Court submitted a proposed
8 limiting instruction on this issue that was, I thought,
9 slightly different, it may have been similar but
10 different than what I'm reading both in the Court's
11 charge and, you know what, I have -- all right.

12 Gentlemen, so this is -- this is -- this is
13 the language that we submitted as a prospective limine
14 and -- this was never used.

15 All right. Gentlemen, the Court is going
16 to -- to modify paragraph ten which deals with evidence
17 on Medicare claims as follows, and obviously, will hear
18 your objections accordingly, if any.

19 It should read: The Government is not
20 required to prove that each and every claim submitted by
21 the Merida Group entities to Medicare was fraudulent.
22 Nor, is it a defense to the crimes of conspiracy to
23 commit health care fraud (Count One) or health care
24 fraud, (Counts Two through Seven) that Defendant
25 submitted some number of legitimate claims.

1 However, in order for you to find the
2 Defendant guilty of Conspiracy to Commit Health Care
3 Fraud (Count One) or health care fraud (Counts Two
4 through Seven) you must find that the Government proved
5 the elements of these offenses, and -- and I'm going to
6 insert, you must -- you must find that the Government
7 proved the elements of these offenses beyond a
8 reasonable doubt. Rather than as I instructed you
9 above.

10 MR. TONY CANALES: But I thought -- didn't
11 you say for that -- for that particular -- for this
12 specific claim.

13 THE COURT: You must find that the
14 Government proved the elements of these offenses beyond
15 a reasonable doubt.

16 MR. TONY CANALES: But we're trying -- we're
17 trying those -- the Counts Two to Seven are specific
18 claims, and so you're not going specific claims, you're
19 taking it out because you did say it before, the jury
20 must find the Government prove the elements of the
21 substantive offenses for the -- for that specific claim.
22 And I say specific claim means Counts One, Counts Two to
23 Seven.

24 THE COURT: Again, gentlemen, let -- let
25 me -- that is the language that's going to appear on

1 page ten as instructed.

2 Let me see it.

3 MR. TONY CANALES: Okay.

4 THE COURT: And we'll hear your objections
5 on that shortly.

6 MR. TONY CANALES: Very well.

7 THE COURT: All right? All right.

8 Are there any other issues we can take up
9 while Mauricio's drafting, any other objections?

10 MR. LOWELL: Yes, Your Honor.

11 Page ten, jury instructions. Definition of
12 willfully. It's at the bottom of the page. We would
13 ask the Court to adopt the jury instruction proposed by
14 Defendant Mesquias. This is instruction number 14.

15 And, Your Honor, we're showing you on the
16 ELMO the specific instruction that Defendant Mesquias
17 proposed, and within the brackets is an additional
18 sentence that we believe should be included with the
19 Court's -- we would ask the Court to include in its set
20 of instructions.

21 MR. TONY CANALES: And we have withdrawn
22 that particular request because you've -- I believe you
23 have adequately covered it in paragraph ten, page ten
24 under the relevant term defined of willfully.

25 I think mine is -- I forgot where I got this

1 copy from but I don't think -- I'm withdrawing it.

2 MR. GUERRA: You need to lose that copy.

3 MR. TONY CANALES: What's that?

4 MR. GUERRA: You need to lose that copy.

5 MR. TONY CANALES: Yeah.

6 MR. GUERRA: Your Honor, on behalf of
7 Defendant Francisco Pena, we -- we object to the
8 proposed instruction, I guess proposed by the Government
9 and by form proposed by Defendant Mesquias.

10 We believe that the language proposed on
11 page ten under relevant terms defined number two for
12 willfully covers everything in this proposed
13 instruction, including with -- with the idea of -- of
14 knowledge of disobeying or disregard of the law.
15 Therefore, we ask that the Court overrule the
16 Government's objection and keep the instruction as is.

17 MR. TONY CANALES: And of course we withdraw
18 it.

19 MR. CYGANIEWICZ: Mr. McInnis joins in that
20 objection, Your Honor.

21 THE COURT: All right. Gentlemen, the --
22 the Government's objection is overruled.

23 MR. LOWELL: Your Honor, on --

24 THE COURT: In other words, the language
25 will remain the same.

1 MR. LOWELL: Yes, Your Honor.

2 Going to page 15. And focusing on the count
3 nine obstruction of criminal investigations of health
4 care offenses. We'd respectfully ask the Court to add
5 an attempt instruction here.

6 MR. GUERRA: Your Honor, respectfully on
7 behalf of Defendant Francisco Pena, we object to the
8 Government's request.

9 We believe that as written, the instruction
10 contains everything as required under the pattern jury
11 charge, it also includes, at least on a couple of
12 instances where they talk of the attempt. Every --
13 everything that they have plead in their indictment is
14 covered within the instruction for Count Nine, and
15 therefore, any additional instruction is unnecessary
16 and, therefore, we ask for this to be overruled --
17 sustain the objection.

18 THE COURT: All right. Gentlemen, the --
19 Government's, forgive me, the Government's objection is
20 overruled. The -- the language will remain the same.

21 Anything else?

22 MR. LOWELL: Your Honor, going to page 16 of
23 the instructions. Directing the Court to the bottom of
24 the page under Count 12 Conspiracy to Pay and Receive
25 Health Care Kickbacks, paragraph three.

1 Paragraph three states that an overt act,
2 there's an overt act requirement under the specific
3 statute and that's inconsistent with the law.

4 I apologize, Your Honor, count -- Count 11
5 Conspiracy to Obstruct Justice under paragraph three
6 right dead-center of the page. It includes an overt act
7 requirement when one is not required under 1512(k), the
8 section of the statute, so we'd ask the Court
9 respectfully to strike paragraph three.

10 THE COURT: All right. Well, one -- one
11 second. One second. All right. That's for the prior
12 objection, gentlemen. We are now on Count 11.

13 All right. Let's look at our notes on Count
14 11. You're saying element number three is -- is -- is
15 incorrect; is that correct?

16 MR. LOWELL: That's correct, Your Honor.

17 THE COURT: Any response by the defense?

18 MR. TONY CANALES: Well, it -- it -- it is
19 true that an overt act is not required for a 1512(k),
20 Your Honor, but when the Government voluntarily
21 submits -- voluntary is an overt act and I think it
22 should be kept there.

23 So they have voluntarily agreed to insert it
24 there in the indictment and I believe the indictment
25 does allege overt acts.

1 Does it allege overt acts? I thought it
2 did.

3 THE COURT: And may -- is that 1512(k) in
4 front of me?

5 MR. TONY CANALES: Yeah.

6 MR. SWARTZ: Yes, Your Honor.

7 THE COURT: Can I see that, please? Please
8 show me what you're referring to.

9 MR. SWARTZ: It's right here.

10 THE COURT: All right, gentlemen. The Court
11 will -- will sustain the objection to delete paragraph
12 number three as to the overt act not required in
13 1512(k).

14 So Mauricio, go ahead and -- and delete
15 paragraph three. It should only be two paragraphs in
16 that section.

17 All right. Next, please?

18 MR. LOWELL: Your Honor, we have an
19 agreement on page 13, this is Count Six.

20 THE COURT: Well, agreements you don't need
21 to address the Court with. The Court will grant all
22 agreements, just give those to Mauricio so he can draft
23 it into the -- into the charge.

24 MR. LOWELL: Yes, Your Honor.

25 THE COURT: Are there any other objections

1 that need a ruling on by the -- the Government?

2 MR. LOWELL: No, Your Honor.

3 THE COURT: Mr. Canales, are there any
4 objections by Defense that need a ruling on?

5 MR. TONY CANALES: Yes, Judge, I lost my
6 notes. They're here somewhere.

7 THE COURT: All right. Go ahead and
8 coordinate it, organize that, let's -- let's -- let's
9 see where we are on the charge. I'm not leaving.

10 (Brief pause in proceedings.)

11 MR. TONY CANALES: Can I have just
12 overnight --

13 THE COURT: No, Mr. Canales, respectfully,
14 first thing in the morning I'm going to read it into the
15 record so your objections need to come now, so go ahead
16 and give me your objections.

17 MR. HECTOR CANALES: Just make it, just say
18 it.

19 MR. TONY CANALES: Okay, Your Honor, let me.

20 MR. HECTOR CANALES: All right, you asked --

21 MR. TONY CANALES: I circled some stuff here
22 that I didn't -- I'm coming, Judge, I'm -- okay, Judge,
23 we have a couple of references.

24 I'm going to start with count -- page 14,
25 paragraph -- page 14, paragraph three, at the bottom it

1 says, paragraph number one, this is under the
2 instruction on the counts listed in the indictment as to
3 Count One. It says, the Defendant and at least one
4 other person made an agreement to commit the crime of
5 health care fraud as charged in the indictment.

6 I submit to the Court I do not know what in
7 the indictment means. Let me go back and get some other
8 things that I saw there.

9 We would object to that language, Judge.

10 One more. I see it in Count Number 11 at
11 page 20. It says, Count 11 Conspiracy to Obstruct
12 Justice. Paragraph one, the Defendant and at least one
13 other person made an agreement to commit the crime of
14 obstructing justice as charged in the indictment.

15 One more. We object to Count 12, the
16 Court's charge where you say, Count 12, paragraph one,
17 the Defendant and at least one other person made an
18 agreement to commit the crime of paying or receiving
19 kickbacks as charged in the indictment.

20 And of course, we're supposed to -- this --
21 I object to that language as charged in the indictment.

22 I saw one here that we agreed to, by the
23 way, Mr. Swartz, paragraph three. One of the
24 conspirators during the existence of the conspiracy --
25 I'm going to slow down, sorry -- knowingly committed at

1 least one of the overt acts described.

2 I thought we had agreed to that one.

3 MR. SWARTZ: Are you looking at Count 12?

4 MR. TONY CANALES: Yes, sir. I thought we
5 had agreed.

6 MR. SWARTZ: Count 12 is 18 U.S.C. 1371

7 which does have an overt act requirement. We were
8 talking about --

9 MR. TONY CANALES: You're right, you're
10 absolutely right, you're right, I'm sorry, take it back.
11 371 conspiracy I should know this, I'm the one that made
12 the bad law in the Fifth Circuit. 371 conspiracy does
13 require an overt act and they say overt act. I'm sorry,
14 Your Honor, I thought we were talking about --

15 THE COURT: Revised Count 11.

16 MR. TONY CANALES: Count 11, that's where we
17 dropped it.

18 THE COURT: Count 12 retains the overt act
19 and count 11 removes.

20 MR. TONY CANALES: Does not. Count 11 talks
21 about as charged in the indictment; I submit to the
22 Court we object to the way the charge is written because
23 as charged in the indictment is vague and I just do not
24 understand it.

25 So that's my objection.

1 THE COURT: All right. So there -- the rest
2 of your objections are to references that deal with --
3 as charged in the indictment, correct?

4 MR. TONY CANALES: Yes, Your Honor. And I
5 had already -- before that I had already made some other
6 objections.

7 THE COURT: Government's response?

8 MR. SWARTZ: Your Honor, at the outset of
9 the case the jury -- the jury members did hear the
10 entirety of the indictment, so I think the -- the issue
11 would be does including the word as charged in the
12 indictment create confusion for the jurors? They heard
13 the indictment so I would submit that it doesn't create
14 any confusion for the jurors.

15 MR. TONY CANALES: Very well.

16 THE COURT: Well, the ruling -- the
17 objection to that global objection to that -- that
18 phrasing is overruled.

19 MR. TONY CANALES: Yes, Your Honor.

20 THE COURT: Are there any other objections,
21 Mr. Canales?

22 MR. TONY CANALES: None other than what we
23 said before on the --

24 THE COURT: No, no, obviously everything --
25 you've already to that's all part of the record.

1 MR. TONY CANALES: Yes, Your Honor.

2 THE COURT: As has the Government.

3 MR. TONY CANALES: I finished for tonight.

4 MR. CYGANIEWICZ: And on behalf of
5 Mr. McInnis, also, we join in those objections.

6 THE COURT: As I stated, the rulings apply
7 to all three Defendants.

8 MS. ARCE-FLORES: Thank you, Judge.

9 THE COURT: And all three Defendants asked
10 that they align themselves with the objections given by
11 Mr. Canales.

12 MS. ARCE-FLORES: Thank you, Judge.

13 MR. CYGANIEWICZ: Your Honor, Mr. McInnis
14 has one more specific objection as to on page 14. I
15 spoke to Mr. Swartz about this and he's kind of left it.

16 But the instructions regarding Count One at
17 the bottom says that Defendant joined in the agreement
18 willfully. We are proposing that it also should include
19 and knowingly. It mentions above for anyone to
20 knowingly and willfully combine, that tracks the
21 statute, it tracks the indictment.

22 Again, on page 14, paragraph three, it says
23 the Defendant joined in the agreement willfully, it
24 should -- we -- we suggest and we request that it should
25 say willfully and knowingly.

1 MR. SWARTZ: And, Your Honor, in response to
2 that, I think he's conflating the language of the health
3 care fraud statute with the language pertaining to
4 conspiracy.

5 And the pattern charge relating to
6 conspiracy says that the Defendant knew the unlawful
7 purpose of the agreement and joined in it willfully,
8 that is with the intent to further the unlawful purpose.

9 So the -- the language in the -- in the
10 Court's draft instruction says they enjoined -- joined
11 in the agreement willfully. So the -- the pattern
12 instructions don't include the word knowingly with
13 respect to conspiracies, so I think as drafted the
14 language proposed by the Court tracks the language of
15 the pattern charge.

16 THE COURT: The objection is overruled. The
17 Court has attempted to as much as possible rely and --
18 and use the pattern jury charge. All right. Anything
19 else?

20 MR. CYGANIEWICZ: Thank you, Your Honor.

21 THE COURT: All right. Anything else?

22 MS. ARCE-FLORES: Nothing else.

23 THE COURT: Ms. Arce-Flores, nothing else on
24 behalf of Dr. Pena?

25 MS. ARCE-FLORES: Nothing else aside from

1 what Mr. Canales and Mr. Cyganiewicz objected to.

2 THE COURT: Thank you, everyone.

3 We'll be in recess.

4 ALL COUNSEL: Thank you, Your Honor.

5 (COURT IN RECESS.)

6

7 REPORTER'S CERTIFICATE

8

9 I certify that the foregoing is a correct transcript
10 from the record of proceedings in the above-entitled
11 matter.

12

13

14

/s/Sheila E. Perales.

SHEILA E. HEINZ-PERALES CSR RPR CRR
Exp. Date: January 31, 2021

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